

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARLOS D. UYBUNGCO, JR. and DEPARTMENT OF THE NAVY,
NAVAL AIRS SYSTEMS COMMAND STATION, San Diego, CA

*Docket No. 03-1619; Submitted on the Record;
Issued November 4, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$874.83; (2) whether the Office of Workers' Compensation Programs abused its discretion in denying waiver of recovery of the overpayment; and (3) and whether the Office erred in requiring full repayment of the overpayment.

The Office accepted appellant's claim for bilateral carpal tunnel syndrome and authorized carpal tunnel releases on April 20 and August 15, 1995. He worked intermittently and was paid temporary total disability compensation from April 29, 1995 and continuing. Appellant attempted to return to light-duty work on April 22, 1996 but sustained a recurrence of disability on that date because no light work was available and temporary total disability benefits were resumed. He chose to go on disability retirement effective March 2000 and indicated on a Form EN1032, dated February 25, 2002, that he had received a disability retirement within the past 15 months. By decisions dated February 2 and February 8, 1999, the Office reduced appellant's compensation to reflect his wage-earning capacity in the position of a hazardous waste management specialist and environmental technician based on a weekly pay of \$653.60 on April 22, 1996, the date of the recurrence of disability, and on the current hourly pay of \$17.32 for appellant's grade and step, or a current weekly wage of \$692.80. This yielded a weekly compensation rate of \$708.30 which was effective February 28, 1999. By decision dated May 31, 2001, in response to appellant's request for reconsideration, the Office modified appellant's wage-earning capacity, stating that its February 8, 1999 decision contained mathematical "miscalculations" regarding the rate of pay and that it erroneously based appellant's wage-earning capacity on two positions instead of one position. The Office therefore, found that only the position of hazardous waste management specialist reflected appellant's wage-earning capacity.

In a preliminary overpayment determination dated August 22, 2001, the Office found that appellant received an overpayment in the amount of \$784.83, because he received a schedule award and compensation for total disability from April 25 through May 25, 1996; he received compensation, at the wrong pay rate from April 22, 1996 through April 21, 2001; and was paid

compensation based on the wrong loss of wage-earning capacity from February 28, 1999 through February 26, 2000. The Office found that appellant was without fault in the creation of the overpayment. The Office informed appellant that he had 30 days to submit information regarding his income and expenses to determine whether it would be against equity and good conscience or defeat the purpose of the Federal Employees' Compensation Act to recover the overpayment.

Appellant submitted a completed Form EN1032 dated February 25, 2002 describing his employment status and his receipt of other federal benefits.

By decision dated March 13, 2003, the Office finalized the overpayment determination to reflect that appellant received an overpayment in the amount of \$874.83 and found that he was not entitled to waiver of recovery of the overpayment. The Office noted that appellant had 30 days to respond to its August 22, 2001 letter requesting additional information but he did not respond. The Office stated that appellant had presented "no argumentation in that regard or any other evidence, compelling or otherwise" to waive the overpayment. The Office requested that appellant repay the overpayment in one lump sum of \$874.83.

The Board finds that an overpayment of \$874.83 was created.

The Office issued decisions which led to the creation of the overpayment. By decision dated April 30, 1996, the Office issued appellant a schedule award for a 20 percent impairment to each upper extremity for 124.8 weeks [*i.e.*, 873.60 days] based on a weekly pay of \$618.80 from January 8, 1996 to May 30, 1998.

By decision dated March 3, 2000, the Office issued appellant a schedule award for a 20 percent impairment to each arm based on a weekly pay of \$653.60 from February 27, 2000 to March 3, 2002. The Office noted that the award was for 873.6 days but, since appellant had been paid for 139 days in the April 30, 1996 award, there were only 734.60 days remaining.

In a memorandum dated May 7, 2001, the Office addressed errors that had been made in the amount of compensation paid to appellant. The Office stated that it had incorrectly determined appellant's date of recurrence pay rate when it began making total disability payments. The Office noted that appellant received compensation using a pay rate date of February 22, 1996, when it should have used April 22, 1996, the date the recurrence of disability occurred.¹ Due to this error, appellant erroneously received a consumer price index (CPI) payment.² By a telephone call to the employing establishment on May 3, 2001, the Office

¹ Section 5 U.S.C. § 8101(4) of the Act provides that the rate of pay to be used in calculating compensation is based on the greatest of either appellant's monthly pay at the date of injury, the date disability began or the date compensable disability recurred if it recurred more than six months after appellant's return to work. *See Bette L. Kvetensky*, 51 ECAB 346, 348-349 (2000).

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Consumer Price Index (CPI) Adjustments*, Chapter 2.901.12(c), states that the 1966 Amendments to the Act provide for increases in compensation based upon the Consumer Price Index. Under section 5 U.S.C. § 8146(a), increases are granted where the disability (*i.e.*, compensation disability or the date when an injured employee stopped work on account of the injury) occurred more than one year before the effective date of the increase.

determined that appellant's salary on the date of the original injury on November 19, 1994 was \$15.47 and on the date of the recurrence on April 22, 1996 was \$16.34. The Federal Employees' Compensation Act Procedure Manual (FECA-PM) states that appellant's hourly pay at the time of the original injury may be obtained by calling the employing establishment.³ The FECA-PM also provides that where, as here, the hourly salary is reported by the employing establishment and no annual salary was reported, the hourly salary should be multiplied by 2087 and divided by 52 to determine the weekly compensation rate.⁴ The Office multiplied \$16.34 by 2087 and divided the product by 52 to obtain a weekly wage of \$655.79. The Office noted that appellant received payments for temporary total disability, his schedule award and his loss in wage-earning capacity based on a weekly wage of \$653.60 and, therefore, appellant was underpaid in this regard.

The Office also found that, the Office's decision dated February 8, 1999 adjusted appellant's compensation to reflect his loss in wage-earning capacity effective February 28, 1999 but, actually implemented the adjustment on January 31, 1999, resulting in an underpayment to appellant. The Office found that it erroneously interrupted appellant's schedule award on May 26, 1996, instead of April 22, 1996, the date of the recurrence of disability, and the schedule award should have been reinstated as of the March 3, 2000 decision.⁵ The Office noted that the 34 days of the schedule payment should be converted to temporary total disability and that appellant would then be entitled to an award for 768.60 days (734.6 + 34).

The Office noted that, in the May 3, 2001 telephone call to the employing establishment, appellant's current hourly wage for his date-of-injury position, a WG-10/Step 5, was \$17.95, not \$17.32 as noted in a telephone conversation with the employing establishment on December 17, 1998. Applying the formula in the FECA-PM, the Office determined that appellant's current weekly pay rate should be \$720.41 (\$17.95 x 2087 divided by 52), not \$692.80 as in the February 1999 decisions and appellant's loss in wage-earning capacity commencing February 28, 1999 should be adjusted.

In a record report dated May 7, 2001, the Office recalculated appellant's wage-earning capacity using the correct weekly pay rate of \$655.79 on the date of the recurrence of disability and the correct current weekly pay rate of \$720.21 for appellant's grade and step when injured pursuant to the formula in the *Albert C. Shadrick* decision,⁶ codified at 20 C.F.R. § 10.403 (b-e),⁷ which yielded weekly compensation of \$948.00.

³ Federal (FECA) Part 2 -- Claims, *Establishing a Pay Rate*, Chapter 2.900.2.d.(1) (November 1996).

⁴ Federal (FECA) Part 2 -- Claims, *Computing Weekly Pay Rate*, Chapter 2.900.10.c.(2).

⁵ Appellant may not receive concurrent payments for temporary total disability and a schedule award. *See James E. Earle*, 51 ECAB 567, 571, n. 10 (2000).

⁶ 5 ECAB 376 (1953).

⁷ The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings on the date of injury by the current pay rate for the date-of-injury job, then multiplies the employee's earnings by the wage-earning capacity percentage and subtracts that amount from the employee's earnings. 20 C.F.R. § 10.403 (b-3). *See e.g., Donna M. Rowan*, 54 ECAB _____ (Docket No. 03-908, issued July 11, 2003);

By decision dated May 30, 2001, the Office issued appellant a schedule award for a 20 percent impairment to each arm for 768 days from February 27, 2000 to April 5, 2002 based on a weekly pay of \$655.79. The Office noted that, although the pay rate was slightly higher than the pay rate used in the prior schedule award, because the pay rate effective date was April 22, 1996 rather than February 22, 1996, appellant's compensation check would actually decrease. The Office explained that the reason for the decrease was that appellant was not eligible for the CPI increase that occurred in 1998.

In a memorandum dated May 16, 2001, the Office summed up its findings as follows with supporting worksheets and computer printouts. From the period April 22, 1996 to February 27, 1999, appellant should have received a total of \$73,599.22 for temporary total disability benefits based on a date of recurrence pay rate of \$655.79 as of April 22, 1996. However, because appellant received a duplicate payment representing a schedule award from April 25 to May 25, 1996, was incorrectly paid for a loss in wage-earning capacity from January 21 to February 27, 1999 and was paid under the wrong pay rate for the wrong dates for temporary total disability from April 22, 1996 to February 27, 1999 he was actually paid \$74,127.59. Therefore, an overpayment for this time period, from April 22, 1996 to February 27, 1999, was created in the amount of \$528.17 (\$74,127.59-\$73,599.22).

From February 28, 1999 to February 26, 2000, appellant was paid a total of \$11,036.54 for an erroneous loss in wage-earning capacity because the wrong pay rate was used and he should have been paid \$11,608.50. An underpayment for that time period was therefore, created in the amount of \$571.96. From February 27, 2000 to April 21, 2001, appellant was paid \$32,304.57 for a schedule award based on the incorrect pay rate and should have been paid \$31,385.95. Therefore, for that time period, an overpayment of \$918.62 occurred (\$32,304.57-\$31,385.95). The total overpayment was \$874.83, obtained by adding \$918.62 and \$528.17 and subtracting \$571.96. The Office's finding that an overpayment of \$874.83 was created is proper.⁸

The Board further finds that the Office properly denied a waiver of the overpayment.

The waiver or refusal to waive an overpayment of compensation by the Office is a matter that rests within the Office's discretion pursuant to statutory guidelines.⁹ These statutory guidelines are found in section 8129(b) of the Act which states: "Adjustments or recovery by the United States may not be made when incorrect payments has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience."¹⁰ Since the Office found appellant to be without fault in the matter of the overpayment, then in accordance with section 8129(b), the Office may only recover the overpayment if it determined that recover of the overpayment would neither defeat the purpose of the Act nor be against equity and good conscience. A finding that appellant was without fault is not sufficient, in and of itself, for the Office to waive the overpayment.¹¹ The

⁸ The Office's reference to an overpayment of \$784.83 was a typographical error.

⁹ *James A. Gray*, 54 ECAB _____ (Docket No. 02-195, issued December 27, 2002); *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁰ 5 U.S.C. § 8129(b).

¹¹ *James Lloyd Otte*, 48 ECAB 334, 338 (1997); *see William J. Murphy*, 40 ECAB 569, 571 (1989).

Office must exercise its discretion to determine whether recovery of the overpayment would “defeat the purpose of the Act or would be against equity and good conscience,” pursuant to the guidelines provided in sections 10.434 to 437 of the implementing federal regulations.

Section 10.436¹² provides that recovery of an overpayment will defeat the purpose of the Act if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) [t]he beneficiary from whom the Office seeks recovery needs substantially all of his or her current income including compensation benefits to meet current ordinary and necessary living expenses; and (b) [t]he beneficiary’s assets do not exceed a specified amount as determined by the Office from data furnished by the Bureau of Labor statistics. Section 10.437¹³ states that recovery of an overpayment is also considered to be against good conscience if the individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.

Section 20 C.F.R. § 10.438 states:

“(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the [the Office]. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. This information will all be used to determine the repayment schedule, if necessary.

“(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished.”

Although appellant was provided with the opportunity, he submitted no financial evidence to establish that recovery of the overpayment would defeat the purpose of the Act. In the absence of evidence to the contrary, there is a presumption that a letter properly addressed and mailed in the ordinary course of business is presumed to have arrived at the mailing address in due course.¹⁴ The August 22, 2001 preliminary overpayment determination letter, containing the request for financial information, was addressed to appellant at his address of record. On appeal, appellant contended that he did not receive any correspondence from the Office regarding the matter of the overpayment and had not resided at the “Palomar Street address for some time now.” He stated that he filed and completed all the forms that the Office requested in a timely manner. The “Palomar” address appellant referenced is different from the address on the preliminary determination. In any event, there is no evidence in the record that appellant informed the Office of any address change.¹⁵ The evidence therefore, does not establish that the

¹² 20 C.F.R. § 10.436.

¹³ 20 C.R.F. § 10.437.

¹⁴ *Marlon G. Massey*, 49 ECAB 650, 652 (1998).

¹⁵ Appellant’s most recent correspondence in the record from appellant to the Office is the EN1032 form dated February 25, 2002 which notes that appellant’s address is currently in Chula Vista, CA 91911. The Office received that form approximately six months after it sent appellant the preliminary determination.

Office mailed the preliminary overpayment determination to the wrong address as it mailed the preliminary determination to the address of record and it is presumed the correspondence reached appellant's mailing address. Absent evidence documenting appellant's financial status, the Office cannot determine whether appellant is entitled to waiver and waiver cannot be granted.¹⁶ Accordingly, the Office properly determined that appellant was not entitled to a waiver of the overpayment in this case.

The Board finds that it does not have jurisdiction over the method of recovery in this case.

Section 10.441(a) provides that if an overpayment has been made to an individual who is entitled to further payments and no refund is made, the Office "shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstance of the individual and any other relevant factors, so as to minimize any hardship."¹⁷ In this case, appellant is on OPM disability retirement, effective March 2000. The Office, therefore, is not seeking recovery from continuing compensation benefits. The Board notes that it does not have jurisdiction under the Debt Collection Act¹⁸ to consider the matter of recovery of an overpayment.¹⁹ The Board's jurisdiction is limited to instances in which recovery is sought against continuing compensation benefits under the Act.

¹⁶ *James A. Gray, supra* note 1.

¹⁷ 20 C.F.R. § 10.441(a).

¹⁸ 5 U.S.C. § 5511 *et seq.*

¹⁹ *Beverly E. Labbe*, 50 ECAB 440, 443 (1999).

The March 13, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
November 4, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member